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No. 92-109

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LOGAN P. HUNTRESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was reversible error for the district court to replace a juror who was excused for cause after jury deliberations began.

2. Whether the district court erred in declining to conduct an evidentiary hearing on the need to discharge a juror for cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 956 F.2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1992. A petition for rehearing was denied on April 28, 1992. Pet. App. A44-A45. The petition for a writ of certiorari was filed on May 29, 1992. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on five counts of making a false statement to a fed-

erally insured banking institution for the purpose of influencing it in extending a loan, in violation of 18 U.S.C. 1014. He was sentenced to a term of four years' imprisonment, to be followed by five years' probation, and he was ordered to make restitution in the amount of $730,000. The court of appeals affirmed. Pet. App. A1-A43.

1. The evidence at trial showed that petitioner submitted false financial statements when he applied for loans from several banks in San Antonio, Texas. He stated in financial statements submitted to the banks and in discussions with bank officers that he had a substantial unencumbered stock portfolio. In fact, however, petitioner did not own the stocks listed in his financial statements. Officers from the banks relied on petitioner's written and oral statements regarding his financial position in deciding to extend him credit. Pet. App. A2-A3.

2. On the morning of the second day of jury deliberations, the court received a note from the jury foreman stating that one of the jurors wanted a conference with the judge. In response to questioning, the foreman told the judge that the juror had a problem with the facts or the law of the case. The judge told the foreman to submit the juror's question in writing. An hour later, the jury sent a return note to the judge that said, "A juror doesn't want to participate in arriving [at] a verdict. What do we do?" The judge sent a note back stating, "All jurors will continue to deliberate until you have reached a verdict." The jury did not reach a verdict that day. Pet. App. A3-A4.

The next morning, Dr. Nau, a doctor who was treating juror Homoki, contacted the court. Dr. Nau reported that Homoki had checked himself into a hospital the previous night, threatening to ingest poison if the hospital refused to admit him. After some discussion with the

parties, the judge called Dr. Nau to find out the details of the juror's condition. Dr. Nau told the judge over the telephone that the juror was distraught and suicidal, and that he was suffering from paranoia stemming from a history of drug abuse. Dr. Nau expressed the view that Homoki's condition was brought on by stress related to his jury service, and that Homoki could not make a decision in the case in his present condition. He recommended that Homoki not be required to return to jury duty when he was released from the hospital. Defense counsel requested an evidentiary hearing to examine both Homoki and the doctor, but the court determined that its conversation with Dr. Nau provided a sufficient basis for excusing Homoki from jury service. Pet. App. A4-A5.

The district court then presented the parties with three options: allowing the remaining 11 jurors to proceed to a verdict; recalling the alternate juror, Ms. Lizana, who had been discharged when the jury retired to deliberate; or declaring a mistrial. Petitioner objected to the release of Homoki, refused to stipulate to an 11-person jury, and objected to recall of the alternate juror. The government expressed a preference for an 11-person jury, and pointed out that, under Fed. R. Crim. P. 23(b), the court could proceed with 11 jurors without obtaining petitioner's consent. Petitioner then moved for a mistrial based on Homoki's failure to give truthful answers to the voir dire questions concerning his ability to serve on the jury. The court, citing a statement by Dr. Nau that Homoki would have been unable to recognize his psychological condition during voir dire, decided that Homoki did not deliberately lie, and it denied the motion for a mistrial. Pet. App. A5-A7.

Petitioner then requested that alternate juror Lizana be recalled and examined to determine whether she could properly be reimpaneled. The district court recalled

Lizana and questioned her. Lizana stated that she had discussed the case with her boss, but only in general terms, and she stated that the discussion would not influence her decision in the case. The court questioned the 11 remaining jurors regarding their ability to set aside all previous discussions and begin their deliberations afresh with Lizana as a juror. They all stated that they could do so. Based on those interviews, the court decided to reimpanel Lizana, and the reconstituted jury retired to deliberate. After three hours, the jury returned a verdict of guilty on all counts. Pet. App. A7-A8.

3. On appeal, the court of appeals held, first, that "the district judge had an adequate factual and legal basis for dismissing Mr. Homoki." Pet. App. A10. The court rejected petitioner's theory that Homoki was a holdout juror who feigned illness to avoid the pressure of his fellow jurors as "pure speculation with no support in the record." *Id.* at A12-A13. The court stated that, "[a]ssuming that the juror who had a problem participating in a decision was Mr. Homoki, Dr. Nau's statements to the judge support the conclusion that the problem stemmed not from Mr. Homoki's status as a holdout juror, but from a severe, pre-existing condition related to a history of drug abuse." *Id.* at A11.

The court of appeals then concluded, Pet. App. A23, that the district court's reinstatement of the alternate juror violated Fed. R. Crim. P. 23(b), which provides that the district court has discretion to proceed with an 11-person jury when it becomes necessary to discharge a juror for cause after the jury has retired to deliberate.[1]

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[1] Rule 23(b) states:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a

The court explained that "[a]lthough Rule 23(b) does not explicitly bar use of the substitution option, the text of the * * * rule, together with [Fed. R. Crim. P.] 24(c)'s direction to discharge alternate jurors before the jury retires, signals to us that substitution is quite inconsistent with the intent of the drafters of the Rules." Pet. App. A29-A30.

Although the court of appeals found that the reinstatement of the alternate juror violated Rule 23(b), it concluded that reversal was not required because petitioner "waived his right to complain about it when he agreed to the substitution of the alternate juror." Pet. App. A24. The court explained that, while petitioner "did not demand the recall of the alternate juror, * * * his desires (1) not to proceed with 11 jurors and (2) to have his fate decided by a jury of 12 provide decisive evidence that he waived his objection at the time of the trial." *Id.* at A25-A26. The court then determined that petitioner was not prejudiced by the substitution. Pet. App. A26-A28.

ARGUMENT

Petitioner contends that the district court erred in replacing Homoki with an alternate juror after the jury had begun its deliberations; he also contends that the court should have conducted an evidentiary hearing before discharging Homoki. Those claims do not warrant this Court's review.

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valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

1. The court of appeals agreed with petitioner in concluding that the district court violated Rule 23(b) when it reinstated the alternate juror. The court of appeals made clear (Pet. App. A10) that district courts having to excuse a juror after deliberations have commenced should proceed with an 11-person jury instead of replacing the excused juror with an alternate.

Despite the district court's error, the court of appeals was correct to conclude that reversal was not warranted. As the court of appeals held, petitioner effectively consented to the substitution of juror Lizana when he opposed permitting an 11-person jury to reach a verdict and insisted on a jury of 12.[2] Petitioner does not take issue with the court of appeals' finding of consent. Having made the tactical decision at trial to object to an 11-juror verdict—which under Rule 23(b) was the only available alternative to a mistrial—petitioner is in no position to invoke the Rule 23(b) violation as a ground for reversal. See *United States* v. *Guevara*, 823 F.2d 446, 448 (11th Cir. 1987) (finding waiver of claim of improper substitution of a juror following commencement of deliberations); *United States* v. *Josefik*, 753 F.2d 585, 588 (7th Cir.) (same), cert. denied, 471 U.S. 1055 (1985).

Indeed, after the court excused Homoki, defense counsel requested that alternate juror Lizana be recalled and qualified to serve on the jury if possible. VIII Tr. 27. Moreover, defense counsel insisted that certain questions be asked of Lizana, and the court complied with those requests; after the questioning, defense counsel did not object to the court's decision to seat Lizana. *Id.*

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[2] Although petitioner preferred to retain the original jury of 12 members, that option was foreclosed by the district court's decision that Homoki should be discharged. At that point, petitioner's opposition to an 11-person jury "provide[d] decisive evidence that he waived his objection [to the recall of the alternate]." Pet. App. A25.

at 31-33, 35-36. In these circumstances, it would be inappropriate to permit petitioner to claim on appeal that the court erred by following the very procedure he requested, especially since petitioner has failed to allege any prejudice flowing from the substitution of the alternate juror in this case. The courts of appeals have consistently held that, except perhaps in the most exceptional circumstances, a defendant may not obtain reversal of his conviction based on a trial error that he invited. *E.g.*, *United States* v. *Nagi*, 947 F.2d 211, 214 (6th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991); *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 (8th Cir. 1990).

The cases on which petitioner relies do not establish a conflict in the circuits. In *United States* v. *Gambino*, 788 F.2d 938 (3d Cir.), cert. denied, 479 U.S. 825 (1986), the defendants contended that the district court erred in permitting an 11-person jury to return a verdict when a juror was excused after deliberations began, instead of replacing the excused juror with an alternate. The court of appeals rejected that contention, finding that the district court acted properly in refusing to require substitution of an alternate juror. 788 F.2d at 948-949.[3] *Gambino* is consistent with the decision in this case, which recognized that Rule 23(b) requires that the district court either declare a mistrial or proceed with a jury of 11 when a juror is excused after deliberations begin.

Nor does *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), the other case on which petitioner

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[3] In discussing the point, the court stated, 788 F.2d at 948-949, that it would have been error to follow the defendants' preferred course. The court did not suggest, however, that the error would have required reversal. In fact, the court noted that the courts of appeals had "invariably" required a showing of prejudice in similar circumstances before reversing. 788 F.2d at 948.

relies, conflict with the decision in this case. The court of appeals in *Lamb* held that it was reversible error to replace a regular juror with an alternate after deliberations had commenced. In *Lamb*, however, the defendant objected to the substitution of the alternate juror. Accordingly, the court of appeals was not faced with a situation, like that here, in which the defendant had waived his right to have jury deliberations conducted according to the procedures set forth in Rule 23.[4] Indeed, *Lamb* distinguished an earlier Ninth Circuit decision, *Leser* v. *United States*, 358 F.2d 313, cert. dismissed, 385 U.S. 802 (1966), on the ground that the defendant in *Leser* had failed to preserve his objection to the juror substitution.

The Court currently has a related issue pending before it in *United States* v. *Olano*, cert. granted, 112 S. Ct. 1935 (1992). The issue in *Olano* is whether it is plain error for a district court to permit the alternate jurors to observe the jury deliberations. In *Olano*, the Ninth Circuit held that allowing the alternates to observe the jury's deliberations constituted reversible error despite the defendants' consent, because that practice results in inherent prejudice in the form of an invasion of juror privacy. *United States* v. *Olano*, 934 F.2d 1425, 1438 (1991).

There is no need to hold this case pending the decision in *Olano*. The court of appeals in *Olano* thought that the prejudice resulting from the presence of strangers in the jury room justified a finding of plain error. In this case, by contrast, no "non-juror" was present during deliberations, and no questions of jury privacy and possible juror

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[4] Although the *Lamb* court suggested, see 529 F.2d at 1156 n.3, that the violation in that case was automatic reversible error, later Ninth Circuit panels have rejected that position. See *United States* v. *Rubio*, 727 F.2d 786, 799 n.7 (1983) (per curiam); *United States* v. *Crisco*, 725 F.2d 1228, 1233, cert. denied, 466 U.S. 977 (1984); *United States* v. *Lopez*, 581 F.2d 1338, 1342 (1978).

exposure to outside influences are raised. Indeed, the court of appeals in *Olano* distinguished cases such as this one, in which an alternate juror is substituted for a regular juror, from the situation there, in which non-members of the jury were present during deliberations. See 934 F.2d at 1437 n.21.

2. There is also no merit to petitioner's contention that the district court was required to hold an evidentiary hearing before deciding to discharge Homoki. The decision whether to hold a hearing on the existence of "just cause" to discharge a juror is within the discretion of the trial court. See *United States* v. *Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986); *United States* v. *Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978). That discretion is not abused where the juror's disability is clear. *Fajardo*, 787 F.2d at 1525. Here, the court of appeals correctly concluded (Pet. App. A40 n.1) that, "[g]iven the evidence of Mr. Homoki's disability provided by Mr. Homoki's doctor, the district judge was not required, as [petitioner] argues, to hold an evidentiary hearing." Petitioner's assertion (Pet. 23) that the court "blind[ly] assum[ed]" that Dr. Nau was a real doctor is incorrect. To the contrary, the district court questioned Dr. Nau at length over the telephone, and was well situated to make an informed judgment about Dr. Nau's professional status. See *United States* v. *O'Brien*, 898 F.2d 983 (5th Cir. 1990) (upholding discharge of juror based on trial judge's telephone conversations with the juror's wife and doctor concerning juror's mental condition).

Moreover, petitioner had an opportunity to question Dr. Nau at the time the court was considering discharging Homoki, but failed to bring any facts to the court's attention that called into question either Dr. Nau's veracity or his medical judgment. Before deciding to discharge Homoki, the court informed the parties that Dr. Nau "is available if any one of you want to question him."

VIII Tr. 21. Defense counsel did not take advantage of that opportunity, but let the matter drop without contacting Dr. Nau.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Although petitioner's counsel initially requested an evidentiary hearing on the matter (see VIII Tr. 6-7), counsel did not renew that objection after the court described its conversation with Dr. Nau in detail later in the day. Moreover, although petitioner suggests that there was no basis even for believing that Dr. Nau existed, it is clear from the trial transcript that the district court was familiar with him and had no doubt as to his veracity. See *id.* at 20-21 ("I don't know if you know [Dr. Nau]—he is a psychiatrist here in town and obviously psychiatrists are always called to testify, and he has testified before."). Petitioner's suggestion (Pet. 18-24) that some fraud was perpetrated on the court is inconsistent with his counsel's failure to suggest to the district court that Dr. Nau might not exist or might not be qualified to render an opinion as to Homoki's capacity. Although petitioner claims that "the 'doctor's' opinion * * * was not subjected to any standard of credibility [and] was simply accepted at face value by the trial court," Pet. 23, his counsel failed to seek to question Dr. Nau or otherwise provide any reason for the district court to doubt the accuracy of Dr. Nau's assessment of Homoki's condition.